in another case, viz that the notice of demand must comply strictly with the requirements of s 218(2)(a). See *Re Yap Kim Kee*.[4]

Secondly, *Processed Sand Pty Ltd* v *Theiss Contractors Pty Ltd*[1] and *Deputy Commissioner of Taxation* v *Cye International Pty Ltd*[2] appear to be consistent with the decision of the Court in England in *Re A Company*.[4] In that case, Mervyn Davies J in his judgment at p 1095 said:

> When the demand was made, the amount due to the petitioner was not known to the company... At the time of the demand the company knew there was a dispute and were willing to pay £2,234.38 but that is not to say that they knew that the sum due was £2,234.38. They knew that the petitioner was alleging the sum due to be £12,435.75. As to the petitioner, it knew that the company were disputing liability in that sum. In these circumstances I do not see how the petitioner was in any position to make a genuine demand for a specified sum. *Section 223(a) contemplates a creditor being able to point to a debt of a specified sum that cannot be seriously questioned either as to existence or quantum.* It follows that the petitioner was not at liberty to make use of s 223(a)... I am satisfied that the statutory demand ought not to have been served... (Emphasis added.)

In the present case, the notice of demand has not complied strictly with the requirements of s 218(2)(a). Since the amount stated in the said notice is far in excess of the debt due, failure on the part of the company to pay the sum claimed does not mean that the company is unable to pay its debt under the section. The notice of demand is therefore bad and the court cannot presume that the company is unable to pay its debts.

In the circumstances, I set aside the petition filed on 15 February 1988 with costs to the company in any event. The petitioning creditor is at liberty to file a fresh petition.

Application allowed.

Solicitors: *Yusuf Lee Pathma & Marbeck.*

Reported by *PS Ranjan*

Re Kuala Lumpur Industries Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3-24-277 OF 1989
VC GEORGE J
28 NOVEMBER 1989

Companies and Corporations — Scheme of arrangement — Restraint of proceedings — Companies Act 1965 not tagged on to a s 176(1) application — Considerations in making order — Companies Act 1965, s 176(1) & 10

The plaintiffs were restrained from proceeding against the members of a group of companies ('the group') for a period of two months by an order made under s 176(10) of the Companies Act 1965 obtained by the group by way of an ex parte originating summons on 7 October 1989. At the date, an application under s 176(1) had not been filed. The plaintiffs later filed an application seeking leave to intervene in the originating summons to move the court to set aside the s 176(10) order obtained by the group on the ground that the court did not have the jurisdiction to make the order, and that in any event the order should not have been made. The plaintiffs argued that:

1) the court had no jurisdiction to make a s 176(10) order without there being a s 176(1) application; and
2) unless there had been a proposed scheme of compromise or arrangement between the company and its creditors, the court had no jurisdiction to make a s 176(10) order.

Held, dismissing the plaintiffs' application:

(1) The policy of s 176(10) is not such that a s 176(10) application has to be tagged on to a s 176(1) application, and the two may be brought independently of the other.

(2) In making a s 176(10) order, there must be a proposal of the scheme of compromise or arrangement (not necessarily ready for presenting to the creditors to be voted upon) but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further, the court has to be satisfied that there is or there would be a bona fide s 176(1) application. It is unnecessary that the proposal must emanate from the company to its members or to the creditors; the proposal could emanate from anybody. It is also not necessary that there should be a scheme in a complete form capable of being presented to the creditors for being voted on.

(3) In the instant case, it has to be assumed that the court which gave the ex parte order was satisfied that there was a proposal within the meaning of s 176. In any event, the present court was satisfied that there had come into existence a proposal, and the particulars of the scheme as exhibited gave more than a general layout of the scheme sufficient for the court to determine whether it was feasible. In addition, the intention to use s 176(1) was bona fide as, inter alia, merchant bankers had been commissioned and appeared to have directed their minds to putting up the scheme.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 03-157-89.]

Cases referred to

1 *Re Clements Langford Pty Ltd* (1961) VR 453 (refd)
2 *Re GAE Pty Ltd* (1962) VR 252 (folld)

Legislation referred to
Companies Act 1965 s 176(1), (10)
Companies Act [Aust] s 90(1)

SC Loh (Nik Aliena Salwanee (Ms) with him) for the plaintiffs/applicants.
Jaspal Singh for the respondents.

Cur Adv Vult

VC George J: On 7 October 1989 by an ex parte originating summons the Kuala Lumpur Industries Bhd Group of Companies ('the group') obtained a s 176(10) (of the Companies Act 1965) order whereby the plaintiffs in a number of pending proceedings against one or more of the members of the group were restrained except by leave of the court from all further action or further proceedings against the members of the group, the restraining order to be effective for a period of two months from 7 October 1989.

It would appear that it was envisaged that the s 176(1) (of the Companies Act 1965) order would within that two months be obtained. On 7 October, a s 176(1) application had not been filed.

MBf Finance Bhd ('MBf') is one of such plaintiffs affected by the order of 7 October. On 2 November, it filed its application (encl (9)) in the court file seeking to be given leave to intervene in the originating summons to move the court to set aside the order of 7 October on the ground that the court did not have the jurisdiction to make the order and that in any event the order should not have been made. Leave to intervene was given and I thereafter directed my mind to the application to set aside the order of 7 October.

The said two subsections of the Companies Act 1965 are as follows:

> 176(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.
>
> 176(10) Where no order has been made or resolution passed for the winding up of a company and any such compromise of arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

On the jurisdictional point, MBf's contention is that without there being a s 176(1) application, the court has no jurisdiction to make a s 176(10) order. In any event unless there has been proposed a scheme of compromise or arrangement between the company and its creditors the court has no jurisdiction to make a s 176(10) order.

It is contended that there has been no such proposal. Mr Song Soon Ong, the senior manager of MBf, in his affidavit in support of the application contends, inter alia, that there had not been any proposal of any scheme of compromise or arrangement made to any of the creditors and further what is exhibited as a scheme is not a scheme in which the general principles of it have been defined and as such and that in any event the scheme had not reached a stage where the court would be justified in making a s 176(1) order. He goes on to contend that the scheme the group has in mind is bound to fail. He questions the bona fides of the application suggesting that it was filed for a collateral purpose: to forestall the winding up of a hopelessly insolvent company.

I pause to note that in England they do not have the equivalent of our s 176(10). The Indian equivalent is not in pari materia with ours. In India, it is expressly provided that the equivalent of a s 176(10) application may be brought only after there comes into existence a s 176(1) application. The Australian Act has provisions equipolant to our s 176 in respect of which there has been judicial pronouncements.

Now it is to be noted that the proposal envisaged in s 176 is not necessarily a proposal from the company to its members or to the creditors. The proposal could emanate from anybody — not only from the company and/or its board or its members but even from the creditors (as happened in *Re Clements Langford Pty Ltd*[1] where the proposal appeared to have emanated from a committee made up of some of the creditors of the company in difficulty) or from some other interested party, eg the auditors, a merchant bank looking into the affairs of the company, solicitors of the company, solicitors of one or more of the creditors, accountants and so on. In my view such a proposal of compromise or arrangement could come into existence and be recognized as such without it having been put to the company or to the creditors. For instance, there is nothing in the way of some of the creditors coming up with a proposal without even referring it to the company and one or more of them taking out the s 176(1) application which it is to be noted a creditor is entitled to make. It is the compromise or arrangement that is between the company and its creditors or between the company and its members. The proposal for such compromise or arrangement itself is not necessarily between anybody. It could be unilateral. For example, a merchant bank, having studied the problems of a company, could come up with a proposal that a compromise or arrangement be arrived at between the company and its creditors. But it has to leave it to the company or to the creditors (or any one of the creditors) or a member of the

company to invoke s 176(1) in that while anybody could make such a s 176(1) proposal, it is only the persons or parties prescribed in the subsections that may move the court for a court sanctioned meeting, ie the company or any creditor or member of the company or in the case of a company being wound up, the liquidator.

For there to be a proposal within the meaning of s 176, it is not necessary that there should be a scheme in a complete form capable of being presented to the creditors for being voted on. With respect, I share the views of Sholl J expressed in *Re GAE Pty Ltd*[2] where at p 256 he says:

> (4) It is not necessary to have the scheme in a complete form, capable of being at once sent out with notices of meetings and with the statement required by s 91(1), with a view to its being actually voted on at a meeting or with a view to proxies being appointed for the meeting. If it were to be held that preparation to that point was essential, the purpose of s 90(6) would in my judgment be substantially defeated. Once it becomes known or suspected among creditors that a compromise or scheme of arrangement is to be proposed, there is a risk of some creditors rushing in in an attempt to obtain a preference by the completion of execution. If in those circumstances the company and the rest of the creditors had to wait until there was time to prepare a full scheme, ready in all details to send out for the purpose of consideration at a meeting or meetings ordered by the court, the desire of the legislature to protect the assets pending the possible adoption of the scheme would be defeated. I would point out, incidentally, that s 91(1) is capable of being satisfied after a court order for meetings, so that an order under s 90(1) can be made before the scheme is finalized in its ultimate detail, so long there is a scheme which 'is proposed'.
>
> (5) There must, however, be at least a scheme the general principles of which have been defined, and which, though it may need completion by the addition of details such as schedules of creditors and their debts, is nevertheless at a stage at which the court would be justified in ordering a meeting of creditors. There must be, in my opinion, a scheme prepared to that point, before the court can convene meetings or order a stay ...

And where there is such a proposal and even before it is put to anybody, the company or any member or creditor of the company may move the court for a restraining order pursuant to s 176(10). In my judgment, the policy of the section is not such that a s 176(10) application has to be tagged on to a s 176(1) application. The two may be brought independent of the other. This view of the matter, I think, is shared by Sholl J, Adam J and Little J of the Supreme Court of Victoria. In *GAE Pty Ltd*[2] at p 254 where he talks of there having to be a definite scheme and goes on to deal with the question of ordering a stay of proceedings, Sholl J goes on to say:

> However, I understand from his Honour (Adam J) that the general effect of his decisions was that he declined to hold that a scheme or arrangement 'has been proposed', within the meaning of sub-s (6), when all that had taken place was of such an indefinite nature that it could merely be said it was proposed to make a proposal. In other words, he required that there should be something in the way of a definite scheme for consideration. On the other hand, he took the view, with which I respectfully agree, that it was unnecessary to show that meeting had already been called, or even that the scheme had reached such a detailed state of preparation that it could go out there and then for consideration by a meeting of creditors. He took the view, with which again I agree, that the value of the subsection would be substantially lessened if one required preparation of a fully detailed scheme, so that no stay could be applied for unless and until the court had summoned meetings or was at the same moment proceeding to do so. Adam J's decision in *Re Clements Langford Pty Ltd* (unreported) was referred to by Little J, in a recent decision of his own [also called *Re Clements Langford Pty Ltd* reported in (1961) VR 453] where in the light of further events, he granted the stay of execution which Adam J had refused in the case of the same company 13 days earlier. In that case, it appears from Little J's decision that before Adam J refused the stay on the ground that no scheme of arrangement or compromise had been proposed within the meaning of the subsection, four events had taken place, and it was because of the occurrence of a fifth and additional event that Little J held that there had been a proposal which attracted his jurisdiction to stay execution.

In my view, what must be available to the court when considering a s 176(10) application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further, the court has to be satisfied that there is or that there would be a bona fide s 176(1) application.

In the instant case, it has to be assumed that the court that gave the ex parte order was satisfied that there was a proposal within the meaning of s 176, the scheme the subject matter of the proposal is feasible and merits presentation for the consideration of the creditors and that the intention is that there would be a bona fide s 176(1) application made. It is to be noted that the restraining order made is not absolute. With the leave of the court, proceedings may be commenced or continued with. Also, a time limit has been imposed. The restraints are to obtain for two months from 7 October 1989.

In any event I am also satisfied that:

(1) There had come into existence a proposal.

(2) The particulars of the scheme as exhibited give more than a general layout of the scheme sufficient for the court to consider whether it is feasible. No doubt when it is sought to be presented to a court sanctioned meeting of creditors, the applicants will no doubt have to satisfy the meeting that the consents and undertakings of various persons necessary for the implementation of the scheme are available and parties necessary to the implementation of the scheme have contractually bound themselves to a participation as required in the implementation. However, in

the meantime, in my view what is available is sufficient for the court to find that the scheme is feasible. I fail to see that it is not feasible.

(3) The intention to use s 176 is bona fide. The proposed scheme involves a significant participation by the Bee Hin group of companies. The memorandum of understanding executed by Dato Teong Teck Leong on behalf of the Bee Hin group of companies and by Dato' Wong Kee Tat on behalf of the Kuala Lumpur Industries Bhd group of companies exhibited to the supporting affidavit (encl (2) in the court file) and that merchant bankers have been commissioned and appear to have directed their minds to putting up the scheme are matters that are consistent with the bona fides of the matter.

The complaint that the intention of the applicant in taking out the application was to forestall the winding up of a hopelessly insolvent company does not take the matter anywhere since the whole point of s 176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under.

The application encl (9) to set aside the ex parte order of 7 October 1989 is dismissed with costs.

Application dismissed.

Solicitors: *Cheang & Ariff; Albar Zulkifly & Yap.*

Reported by *Teoh Ai Lin*

Re Krishnamurthy Nagaratnam, ex p Mayban Finance Bhd

HIGH COURT (KUALA LUMPUR) — HIGH COURT NO D2-43-5228-87
ZAKARIA YATIM J
11 NOVEMBER 1989

Bankruptcy — Bankruptcy notice — Application for rescission and annulment of receiving and adjudication orders — Amount due at date of bankruptcy notice not specified — Whether notice invalid — Whether filing of application to set aside notice by judgment debtor rendered hearing of petition a nullity — Bankruptcy Rules 1969, rr 9(1) & 95

This was an application by notice of motion for an order that the receiving and adjudication orders made against the applicant on 10 March 1989 be rescinded and annulled. The first ground relied upon by the applicant was that the amount due as of the date of the bankruptcy notice, that is 7 October 1987, was not specified. The second ground was that no act of bankruptcy had been committed by the applicant because on 3 November 1987 he had filed an application by notice of motion to set aside the bankruptcy notice and that the hearing of the petition was a nullity and the receiving and adjudication orders should be rescinded with costs. The bankruptcy notice was issued on 7 October 1987 and served on the applicant on 30 November 1987. The application to set aside the bankruptcy notice was filed on 3 November 1987 with date of hearing fixed on 20 June 1988. On 20 June 1988, when the application came up for hearing, the date of hearing was fixed on 7 October 1988. On that date, the applicant asked for time to settle the debt. On 17 February 1988 and 10 March 1989, the matter came up for hearing and the applicant again asked for adjournment on both occasions. On the latter date, the application to set aside the bankruptcy notice was not mentioned at all.

Held, dismissing the application:

(1) Since the bankruptcy notice was issued and dated by the senior assistant registrar, it cannot be expected that the judgment creditor could quantify the amount claimed as at the date of the bankruptcy notice as he would not know when the senior assistant registrar was going to issue the notice. It was proper for the judgment creditor to state the amount due plus interest as at 28 February 1987, a date which was earlier than the date of the bankruptcy notice.

(2) In the circumstances of the case, it was too late for the applicant to raise the issue of the hearing of his application to set aside the bankruptcy notice at the hearing of the application to rescind and annul the receiving and adjudication orders.

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-349 of 1989.]

Cases referred to

1 *Ghazali bin Mat Noor* v *Southern Bank Bhd* [1989] 2 MLJ 142 (refd)
2 *Re Farrugia, ex p Deputy Commissioner of Taxation* (NSW) (1988) 80 ALR 651 (follD)
3 *Re The Bankruptcy Act 1966, ex p Commercial Banking Company of Sydney Ltd* (1979) 23 ALR 522 (distd)
4 *Re Sly, ex p Broadlands International Finance Ltd* (1988) 79 ALR 681 (not follD)
5 *Ex p May* (1884) 12 QBD 497 (refd)